No. 9885

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

PEOPLE OF THE STATE OF CALIFORNIA, on the relation of Charles J. McColgan, as State Franchise Tax Commissioner,

Appellant,

vs.

JOHN HOWARD BRUCE,

Appellee.

BRIEF FOR APPELLEE.

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STATEMENT AS TO JURISDICTION.

Appellee contends the Federal District Court was without jurisdiction herein, because:

A. I—(a) One State need not enforce the revenue laws of another;

(b) It is not a controversy between citizens of different States.

II—Sec. I, Article IV of the Constitution does not apply.

III—Jurisdictional amount is lacking.

IV—Federal statutes do not affect State Revenue Laws.

STATEMENT AS TO MERITS.

B. I—No tax assessment was levied against any property or person of appellant in California.

(a) The income sought to be taxed was received and realized when appellee was a non-resident of California.

(b) The Income Tax law of California exempts income of non-residents, unless source of income was within State, and property had business situs therein.

(c) California statute declares income such as sought to be taxed, is not from sources within State.

SUMMARY OF ARGUMENT.

The judgment of the lower Court should be affirmed because:

1. The Federal District Court was without jurisdiction.
2. Under the statutes of California, and the facts upon which appellant relies, no tax was due.

ARGUMENT.

A. I. (a) THE QUESTION AS TO WHETHER THE COURTS OF ONE STATE WILL ENFORCE THE LAWS OF ANOTHER STATE, DEPENDS UPON THE JURISDICTIONAL PREREQUISITES AND THE NATURE OF THE ACTION.

In discussing the jurisdictional grounds urged by appellant, we must keep in mind the well settled rule

that United States District Courts are of limited jurisdiction and can exercise jurisdiction only when the controversy in question falls within the general grant of judicial power made by Sec. 2 of Article III of the Federal Constitution and also within the specific grant of a congressional enactment.

> "The federal courts are of limited jurisdiction, having jurisdiction only in those specific cases fixed by statute."
>
> *McLaughlin v. Western Union Telegraph Co.,* 7 Fed. (2d) 177 at 179;
>
> *Nashville v. Cooper,* 6 Wall. 247, 252, 18 L. Ed. 851;
>
> *Kline v. Burke Const. Co.,* 260 U. S. 226, 234, 43 S. Ct. 79, 82, 67 L. Ed. 226, 24 A. L. R. 1077.

To the same effect are:

> *Sheldon v. Sill,* 8 How. 441, 12 L. Ed. 1147;
>
> *The Sewing Machine Companies,* 18 Wall. 553, 577, 21 L. Ed. 914;
>
> *Stevenson v. Fain,* 195 U. S. 165, 25 S. Ct. 6, 49 L. Ed. 142.

Section 24 of the Judicial Code (Sec. 41, Title 28, U.S.C.A.) sets out the proceedings in which the district Courts have jurisdiction. The material portions of that section are as follows:

> "The district Courts shall have original jurisdiction as follows:
>
> (1) . . . First. Of all suits of a civil nature, at common law or in equity, brought by the United States, or by an officer thereof authorized by law to sue, or between citizens of the same

> State claiming lands under grants from different States; or, where the matter in controversy exceeds, exclusive of interest and costs, the sum of value of $3,000, and (a) arises under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, or (b) is between citizens of different States, or (c) is between citizens of a State and foreign States, citizens, or subjects. . . ."

Our inquiry is therefore narrowed to the question of whether it arises under the Constitution, laws or treaties of the United States or is between citizens of different States.

Appellant contends first that "The United States Supreme Court has held that Federal District Courts have original jurisdiction in actions by States to collect taxes due from non-residents". (Appellant's Opening Brief page 7.)

It is not clear therefrom whether counsel mean that Federal District Courts having jurisdiction by reason of some specific statutory provision are not ousted of such jurisdiction by reason of the fact that the action is brought by a State to collect taxes from a non-resident, or whether they intend to infer that the nature of the action in question in and of itself vested jurisdiction in the lower Court.

While we feel that there is some question as to the right of a Court of competent jurisdiction to entertain an action by a foreign State to collect taxes, we do not deem the matter to be of importance in the case at bar. If, however, appellant is arguing that

the nature of the action is the thing that vests jurisdiction in the Court we must challenge him to point out the portion of the statute which provides that Federal District Courts shall have jurisdiction over such actions.

Appellant relies upon *Milwaukee County v. White,* 290 U. S. 268, 80 L. Ed. 220, and *Massachusetts v. Missouri,* 308 U. S. 1, 84 L. Ed. 3, to sustain its first contention.

In the former case the Court said:

> "The relevant facts, as stated by the certificate, are that the appellant, Milwaukee County, a county and citizen of Wisconsin, brought suit in the District Court for Northern Illinois against M. E. White Company, appellee, a corporation and citizen of Illinois, to recover on a judgment for $52,165.84 which appellant had duly recovered and entered against the Appellee in the Circuit Court of Milwaukee County, Wisconsin, a court of general jurisdiction. . . ."

While the above language speaks for itself and at the risk of repetition we submit that the Court was considering a question where the district Court had jurisdiction by reason of the diversity of citizenship of "Milwaukee County, a county and citizen of Wisconsin" and "M. E. White Company . . . a . . . citizen of Illinois" and that the only question as to jurisdiction was whether or not the action on the judgment for taxes was a suit "of a civil nature" within the purview of the statute.

While the Court held that such judgment was entitled to full faith and credit in Illinois, there is no

suggestion that the jurisdiction of the lower Court was invoked or sustained by reason of anything other than diversity of citizenship and a suit "of a civil nature".

In *Massachusetts v. Missouri* the Supreme Court declined to permit the State of Massachusetts to file an original action in that Court against the State of Missouri and certain citizens thereof. The Court observed that:

> ". . . To open this Court to actions by States to recover taxes claimed to be payable by citizens of other States, in the absence of facts showing the necessity for such intervention, would be to assume a burden which the grant of original jurisdiction cannot be regarded as compelling this Court to assume and which might seriously interfere with the discharge by this Court of its duty in deciding the cases and controversies appropriately brought before it."

The Court then went on to say:

> "In this instance it does not appear that Massachusetts is without a proper and adequate remedy . . . With respect to the character of the claim now urged, we are not advised that Missouri would close its courts to a civil action brought by Massachusetts to recover the tax alleged to be due from the trustees. The Attorney General of Missouri at this bar asserts the contrary. He says that 'it would seem that Massachusetts should be able to bring a suit against the trustees for the collection of its taxes, in either a Missouri state court or in a federal district court in Missouri', and that 'such a suit would be of

civil nature and would present a justicable case or controversy'."

We submit that the decision is based upon the fact that the State of Missouri did not close its Courts to such an action; that the state Courts provided a proper and adequate forum for the complaining party. Whether the statement of the attorney general of Missouri to the effect that the Federal Courts in that State would entertain jurisdiction of the action was made inadvertently or whether it was made by reason of some federal question involved in that particular controversy, does not appear from the opinion. We submit that the opinion does not overrule the long line of cases holding that a State cannot sue in a Federal District Court by virtue of the fact that it is a State and does not read into the statute words which do not appear therein. It takes more than the admission of a litigant to change a federal statute, the meaning of which has been rendered clear by a unanimity of judicial construction over a long period of years.

We therefore submit that the nature of the instant case is not an independent ground of jurisdiction.

(b) APPELLANT NEXT CONTENDS (APPELLANT'S OPENING BRIEF, PAGE 8) THAT THE LOWER COURT HAD JURISDICTION BY REASON OF THE DIVERSITY OF CITIZENSHIP.

Appellant first states (Appellant's Opening Brief, page 8) that, "a State is not a citizen of itself and hence does not come within the terms of the grant of jurisdiction". With this statement the authorities are in unanimous accord.

Appellant next states (Appellant's Opening Brief, page 9) that Art. III of the Constitution "confers jurisdiction on the Federal Courts in actions by a State against the citizens of other States". To this statement we take emphatic exception. "The judicial power [of the United States] shall extend" to such cases but as pointed out above, inferior Courts of the United States "which are created by statute 'can have no jurisdiction but such as the statute confers'."

Edward Sales Co. v. Harris Structural Steel Co., 17 F. (2d) 155.

The Constitutional provision referred to merely permits the Congress to confer such jurisdiction upon such Courts if it chooses to do so—it has not done so. Appellant then goes on to say that jurisdiction in this case should not be relinquished merely because a state officer is suing in behalf of a State. We submit that appellant is putting the cart before the horse. Jurisdiction must be acquired before it can be relinquished. In order to be acquired it must be specifically authorized by statute.

There are two complete answers to appellant's contention as to diversity of citizenship:

First: The State of California being the real party in interest is the plaintiff in the action and hence jurisdiction cannot be, and has not been, invoked on this ground.

Second: The amount in controversy is less than $3000.00, as will hereinafter be shown.

The matter of diversity of citizenship was considered at length in the *State of Nevada Ex Rel. City of Reno v. Reno Traction Co.,* 41 Nev. 405, 71 Pac. 375, where the Court was considering a motion to remove the proceeding to the Federal Court. It was there said,

> ". . . The proposition before us may be put thus: If the action is one instituted by the State as the real party in interest against a foreign citizen, the cause is not removable. If the action is one between the city of Reno as plaintiff and a foreign citizen, the cause is removable, and the order prayed for should be entered."
>
> . . . If the state, exercising its right of control over the streets of the city of Reno, was the real party in interest, and only acted through its agent in the granting of the franchise to the predecessors of the defendant, then we take it that it will not be gainsaid that the state is the real party interested, looking to the carrying out of the terms of that franchise and the enforcement of the ordinance by and through which the franchise was in the first instance granted. In the action at bar the state proceeds in this court on the relation of the city of Reno, but the State of Nevada is the plaintiff and the real party in interest."

It is, of course, obvious that the State of California is the real party in interest in the instant proceeding. When taxes are collected it is the state that receives them through its agent, the tax collector. He has no personal interest in the funds received and no duty save to collect and hold the same for his principal. We

might well rest our case on this point upon the decision in *M. K. & T. Ry. Co. v. Hickman et al.,* 183 U. S. 53, 46 L. Ed. 78, which is relied upon by appellant. After holding that the state is the real party in interest "when the relief sought is that which inures to it alone" the Court said,

> ". . . Such a case was Ferguson v. Ross, 3 L.R.A. 322, 38 Fed. 161. There an action was brought in the name of Ferguson, a shore inspector, against Ross and others, to recover a penalty. The statute of New York authorized the suit to be prosecuted in the name of the inspector, but all the moneys recovered were payable into the treasury of the state, and it was held by the circuit court for the eastern district of New York that the action was one in which the real party plaintiff was the state. It was for its sole benefit that the action was brought, and it alone was to be benefited by the recovery.
>
> But this case is not like Ferguson v. Ross, and does not come within the rule above stated. It is not an action to recover any money for the state. Its results will not inure to the benefit of the state as a state in any degree. It is a suit to compel compliance with an order of the railroad commissioners in respect to rates and charges. The parties interested are the railway company, on the one hand, and they who use the bridge, on the other; the one interested to have the charges maintained as they have been, the others to have them reduced in compliance with the order of the commissioners. They are the real parties in interest, and in respect to whom the decree will effectively operate."

See also:

Robertson v. Jordan River Lumber Co., 269 Fed. 606;

and

Hertz v. Knudson, 6 F. (2d) 812.

If, for the purpose of argument, it be conceded that McColgan, Commissioner, is the real plaintiff in this action the law is well settled that he has no capacity to sue outside the State of California.

This precise question has been considered by the Supreme Court in the case of *Moore v. Mitchell,* 30 F. (2d) 600, affirmed in 281 U. S. 18, 74 L. Ed. 673. There the plaintiff as county treasurer of Grant County, Indiana, brought an action in the United States District Court for the southern district of New York. The action was for taxes alleged to be due the county and plaintiff proceeded under a statute which authorized him to

> " 'institute and prosecute to final judgment and execution, all suits and proceedings necessary for the collection of delinquent taxes owing by any person residing outside of the state of Indiana or by his legal representatives . . .' "

The Court said:

> "The first question for consideration is whether petitioner had authority to bring this suit.
>
> The United States district court in New York exercises a jurisdiction that is independent of and under a sovereignty that is different from that of Indiana . . . And, so far as concerns petitioner's capacity to sue therein, that court is not

to be distinguished from the courts of the state of New York . . .

Petitioner claims only by virtue of his office. Indiana is powerless to give any force or effect beyond her own limits to the Act of 1927 purporting to authorize this suit or to the other statutes empowering and prescribing the duties of its officers in respect of the levy and collection of taxes. And, as Indiana laws are the sole source of petitioner's authority, it follows that he had none in New York . . . He is the mere arm of the state for the collection of taxes for some of its subdivisions and has no better standing to bring suits in courts outside of Indiana than have executors, administrators, or chancery receivers without title, appointed under the laws and by the courts of that state. It is well understood that they are without authority, in their official capacity, to sue as of right in the Federal courts in other states. From the earliest time, Federal courts in one state have declined to take jurisdiction of suits by executors and administrators appointed in another state . . . The reasons on which rests this long established practice in respect of executors, administrators and such receivers apply with full force here. We conclude that petitioner lacked legal capacity to sue."

The Circuit Court of Appeals, Second Circuit, in that case, said in part:

"Taxes are imposts, not debts, collected for the support of the government. The form of procedure to collect them cannot change their character. No contractural or quasi-contractural ob-

ligation to pay arises out of the assessment. The enforcement of revenue laws rests not in consent, but on force and authority. State of Colorado v. Harbeck, 323 N. Y. 71, 133 N. E. 357. An action for debt cannot be maintained to collect a tax in the New York State courts . . . With the appellees and the property without the State, and the estate being administered in New York, the effort to collect a tax for a political subdivision of Indiana, is repugnant to the settled principles of private international law which precludes one State from acting as a collector of taxes for a sister State, and from enforcing its penal or revenue laws as such. The revenue laws of one State have no force in another. The taxing power of a State is, by the Federal Constitution (Amendment 14) limited to persons and property within its jurisdiction. Wisconsin v. Pelican Ins. Co., 127 U. S. 266, 8 S. Ct. 1370, 32 L. Ed. 239 . . .

In State of Colorado v. Harbeck, supra, it was held that the State Court could not be used to collect taxes due a sister State. The action was brought to recover an inheritance tax upon the estate of Harbeck, a resident of Colorado. He died in New York. The will and codicils were probated in New York, and the taxes were assessed as upon the estate of a non-resident and paid. No provision was made in the accounts finally settled for the payment of transfer tax to the State of Colorado, which had notice of the proceedings in New York. The estate which was assessed for taxation consisted of stocks and bonds, none of which were physically present in Colorado at the time of decedent's death or there-

after. The complaint was dismissed. The tax laws of one State cannot be given extra-territorial effect, so as to make collections through the agency of the courts of another State. Indiana's political subdivision, Grant County, is limited in the payment of taxes to the property found within its boundaries: State of Iowa v. Slimmer, 248 U. S. 115, 39 S. Ct. 33, 63 L. Ed. 158; Ashley v. Ryan, 153 U. S. 436, 14 S. Ct. 865, 38 L. Ed. 773; Matter of Anita Bliss, 121 Mis. Rep. 773, 202 N.Y.S. 185; Walker v. Treasurer and Receiver General, 221 Mass. 600, 109 N. E. 674; People v. Kellog, 268 Ill. 489, 109 N. E. 304.

In Wisconsin v. Pelican Ins. Co., 127 U. S. 265, 8 S. Ct. 1370, 32 L. Ed. 239, . . . the Supreme Court pointed out the rule that the courts of no country execute the penal laws of another applies, not only to prosecutions and sentences for crimes and misdemeanors, but to all suits in favor of the State for the recovery of pecuniary penalties for any violation of statutes for the protection of its revenue . . . Under the due process clause of Constitution (amendment 14) Indiana had no jurisdiction to impose a tax, because neither the property nor the deceased was within its jurisdiction at the time the tax was assessed. It may not now use the national district court outside of the State to collect such tax."

We here point out that in the case at bar, neither the property nor appellant was in the State of California when the tax was assessed.

The concurring opinion of Circuit Judge L. Hand is in point. He says, in part:

"We must therefore decide whether a tax lawfully imposed in a foregin State can be collected by suit in a Federal Court sitting in another State. Our jurisdiction in this respect is no different from that of a court of the State of New York; the law to be administered is certainly not the law of Indiana, whether it be the law of New York, or whether in such cases there is a common law independent of the laws of any State. Generally, it is, of course, true that a liability arising under the law of a foreign State will be recognized by the Courts of another, and it is not here relevant whether foreign liability is enforced, or another, precisely similar, raised by the law of the forum. A recognized exception is in the case of criminal and penal liabilities. (Citing cases). In some few cases, this exception has been extended to include revenue laws as well. (Citing Colorado v. Harbeck, supra; Municipal Council of Sydney v. Bull, (1909), 1 K. B. 7; Gulledge Bros. Lumber Co. v. Wenatchee Land Co., 122 Minn. 266, 142 N. W. 305, 46 L. R. A. N. S. 697; Canada v. Schulze, 9 Scotch L. T. 4). But so far as I can find, the point has never been passed on by a Federal Court.

While the origin of the exception in the case of penal liabilities does not appear in the books, a sound basis for it exists, in my judgment, which includes liabilities for taxes as well. Even in the case of ordinary municipal liabilities, a court will not recognize those arising in a foreign State, if they run counter to the 'settled public policy' of its own. Thus a scrutiny of the liability is necessarily always in reserve, and the possibility that it will be found not to accord with the policy

of the domestic State. This is not a troublesome or delicate inquiry when the question arises between private persons, but it takes on quite another face when it concerns the relations between the foreign State and its own citizens or even those who may be temporarily within its borders. To pass upon the provisions for the public order of another State is, or at any rate should be, beyond the powers of a Court; it involves the relations between the States themselves, with which courts are incompetent to deal, and which are intrusted to other authorities. It may commit the domestic State to a position which would seriously embarrass its neighbor. Revenue laws fall within the same reasoning; they affect a State in matters as vital to its existence as its criminal laws. No court ought to undertake an inquiry which it cannot prosecute without determining whether those laws are consonant with its own motions of what is proper."

(Nevada has no State Income Tax Law.)

Counsel attempt to avoid the effect of this decision by stating that the Indiana statute did not purport to authorize the plaintiff to institute the proceeding. We suggest that even a casual reading of the statute, the pertinent portions of which are set out above, clearly shows such authorization. The opinion did not question the sufficiency of the Indiana statute but merely decided that "Indiana is powerless to give any force or effect beyond her own limits to the act . . . purporting to authorize this suit . . ." We submit that California is likewise powerless to give any force

or effect beyond her own limits to the act purporting to authorize the suit at bar.

Counsel also rely upon: *Converse v. Hamilton,* 224 U. S. 243, 56 L. Ed. 749; *Clark v. Willard,* 292 U. S. 112, 78 L. Ed. 1160; and *Broderick v. Rosner,* 294 U. S. 629, 79 L. Ed. 1100.

These cases all deal with actions by plaintiffs who were liquidating the assets of insolvent corporations. In each case they appear as quasi assignees or successors in interest to the property formerly owned by the corporation.

The distinction is apparent. The former is merely an agent of the state clothed with no title to the res in controversy. The latter is a trustee empowered to hold and manage the property which he recovers. We submit that *Moore v. Mitchell* is absolutely controlling in a consideration of the case at bar.

Counsel point out (Appellant's Brief page 10) "The Commissioner is comparable to the administrator of an estate . . ." As pointed out in *Moore v. Mitchell,* supra, an administrator has no capacity to sue in a State other than that of his appointment. This is such a firmly established principle of law as to require no argument.

II. SEC. I, ARTICLE IV OF CONSTITUTION DOES NOT APPLY.

Appellant next contends that inasmuch as the lower Court was required to give full faith and credit to the California tax statute by virtue of the federal

constitution and congressional enactments thereunder, the case presents a controversy arising "under the Constitution or laws of the United States".

There are two entirely conclusive answers to this contention.

In the first place the full faith and credit clause and legislation enacted thereunder merely prescribe a rule which must be followed by the Courts; they do not guarantee rights of individuals, the protection of which involves a Federal question.

> "The state presents still another view of the question of jurisdiction. Its complaint alleges that if the securities Company be allowed to hold and control the stocks of the Great Northern and Northern Pacific Railway Companies and to carry out the purpose and object of its incorporation, full faith and credit will not be given to the public acts of the State. This, it is contended, presents a case arising under article 4 of the Constitution, providing that 'full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other state.' . . . We do not think that the clause of the Constitution above quoted has any bearing whatever upon the question under consideration. It only prescribes a rule by which courts, Federal and State, are to be guided when a question arises in the progress of a pending suit as to the faith and credit to be given by the court to the public acts, records, and judicial proceedings of a state other than that in which the court is sitting. Even if it be assumed that the word 'acts' includes 'statutes,' the clause has nothing to do

with the conduct of individuals or corporations; and to invoke the rule which it prescribes does not make a case arising under the Constitution or laws of the United States."

Minnesota v. Northern Securities Co., 194 U. S. 48, 48 L. Ed. 87.

In the second place it does not appear from the complaint that the full faith and credit clause is involved in this action. It is true that defendant in his answer pleaded a defense which might be said to have called into play this provision of the Constitution, but so far as we have been able to discover the decisions are unanimous to the effect that a federal question must be raised by the allegations of the complaint in order to invest the District Court with jurisdiction. The fact that a defendant's pleading may create an issue, the determination of which involves the construction of the Constitution or a law of the United States does not confer such jurisdiction.

"Where jurisdiction is invoked on the ground that a federal question is involved, it must appear from the plaintiff's own statement of his claim in the declaration, bill, or complaint that the dispute is one which really and substantially involves some right under the constitution, laws, or treaties of the United States. If plaintiff's complaint, petition, declaration, or bill does not show federal jurisdiction it cannot be shown by the answer or any subsequent pleading in the case . . . Jurisdiction cannot be conferred by anticipating a defense which may or probably will be set up by defendant, the maintenance or avoidance

of which involves the determination of a federal question."

25 *C. J.* 775.

". . . Where, however, the original jurisdiction of a Circuit Court of the United States is invoked upon the sole ground that the determination of the suit depends upon some question of a federal nature, it must appear, at the outset, from the declaration or the bill of the party suing, that the suit is of that character; in other words, it must appear, in that class of cases, that the suit was one of which the circuit court at the time its jurisdiction is invoked, could properly take cognizance. If it does not so appear, then the court, upon demurrer, or motion, or upon its own inspection of the pleading must dismiss the suit; just as it would remand to the State court a suit which the record, at the time of removal, failed to show was within the jurisdiction of the circuit court. It cannot retain it in order to see whether the defendant may not raise some question of a federal nature upon which the right of recovery will finally depend; and if so retained, the want of jurisdiction at the commencement of the suit is not cured by an answer or plea which may suggest a question of that kind."

Metcalf v. Watertown, 128 U. S. 586, 32 L. Ed. 543;

Tennessee v. Union & Planters Bank, 152 U. S. 454, 38 L. Ed. 511.

"The interpretation of the act which we have stated was first announced in Metcalf v. Water-

> town, 128 U. S. 586, 32 L. Ed. 543, 9 Sup. Ct. Rep. 173, and has since been repeated and applied in (here the Court cites 17 cases theretofore decided by it) . . ."
>
> *L. & N. Rd. Co. v. Motley,* 211 U. S. 148, 53 L. Ed. 126.

Appellant states (Appellant's Opening Brief, page 15) that "Congress may not create Courts otherwise competent and refrain from giving them jurisdiction over actions of this nature.

Reliance is placed upon *Kenny v. Supreme Lodge,* 252 U. S. 411, 64 L. Ed. 638, and *Broderick v. Rosner,* 294 U. S. 629, 79 L. Ed. 1100.

These cases hold that a state cannot close its Courts to suits involving the public acts of other States *where such Courts possess general jurisdiction.*

We have no quarrel with the holding of these cases but the vice of appellant's position is that they apply to State Courts of general jurisdiction and not to federal Courts, the jurisdiction of which is limited. As above stated, Congress has plenary power over the jurisdiction of inferior federal Courts. It may grant or withhold jurisdiction exactly as it sees fit. It is true that such a Court is bound to observe the rule laid down by the full faith and credit clause if it is "otherwise competent" to entertain jurisdiction of the action.

III. JURISDICTIONAL AMOUNT LACKING.

The amount sued for is $4345.84. The recovery prayed in the complaint is for the amount of tax, "plus additions for appellee's failure to pay it on time" (Appellant's Opening Brief, page 20).

Disregarding the penalty features of the amended complaint, the facts agreed upon (Appellant's Opening Brief, page 3) are that the income was obtained and realized in Nevada while plaintiff and his wife were living together as such, and under circumstances which make it community property under the laws of both California and Nevada.

Civil Code of California 1937, Sec. 687 (Deering);

Nevada Compiled Laws 1939, Secs. 3355-3356.

Obviously, therefore, appellee's wife owns one-half the income. If taxable, plaintiff below could not possibly have recovered more than half the sum demanded which is less than the jurisdictional amount.

Upon this point, we call attention to the fact that appellant has filed in the Federal District Court of Nevada a suit against the wife of appellee, asking that if the Court should hold in the case at bar, that the income was community property, that she be required to pay a tax upon her proportionate share thereof.

People of the State of California, et al. v. Gertrude Bruce, Civil Case No. 105, U. S. District Court for the Dist. of Nevada.

It is the duty of the Court to dismiss the suit, when it appears with legal certainty plaintiff could not

reasonably be expected to recover the jurisdictional amount, although pleaded.

Wilderman v. Roth 2d, C. C. A. 17 2d, 486.

"It is the matter in dispute which controls the question of jurisdiction, and parties may not make up simulated matters of controversy to give jurisdiction, nor confer jurisdiction by merely claiming a sum above the jurisdictional amount, when in fact, the true amount is less."

Edwards v. Bates County, 55 F. 436, 41 L. Ed. 155.

"Where the actual matter in controversy is inadequate in value to confer jurisdiction, and the additional amount required for that purpose is attempted to be supplied by setting up a claim for something easily susceptible of proof, if made in good faith, but in support of which no proof is offered and no satisfactory explanation given, or by adding a claim for which the law gives no right of action, such a claim must be held to be fictitious, and to have been made for the purpose of perpetrating a fraud upon the jurisdiction of the court."

Bank of Arapahoe v. David Bradley & Co., 72 F. 867, 19 C. C. A. 206.

"In suits for damages, Federal courts are required to take note of the fact, when it is a fact, that the plaintiff cannot, under the allegations of his petition, possibly recover as much as the jurisdictional amount, and the allegations as to the quantum of damages must in such cases be regarded as merely colorable, and made solely for

the purpose of stating a case apparently within the jurisdiction of the Federal Court as to amount."

Clement v. Louisville & N. R. Co., 153 F. 979.

"Even in actions of tort, if it appears clearly from plaintiff's own statement or the testimony of his witnesses that a verdict for the jurisdictional amount would be so excessive as to require the court to set it aside, and grant a new trial, it is its duty to dismiss the case for want of jurisdiction."

Maxwell v. Atchison T. & S. F. R. Co., 34 F. 286.

"When it appears from plaintiff's own testimony that one of the causes of action pleaded never had any existence, and the remaining matters are not sufficient in value to support the jurisdiction, the case must be dismissed."

Horst v. Merkely (C. C. Cal.), 59 F. 502.

"What would be a colorable enlargement of a demand, where the law gives no fixed rule, depends upon the facts in a particular case."

Hayward v. Nordberg Mfg. Co., 85 F. 4, 29 C. C. A. 438.

"Whether plaintiff's demand for damages was colorable and exaggerated to confer jurisdiction on the court, presents a question for the court to decide, which, if proper to submit to a jury, should be submitted as to the facts, and separate from the merits."

Mexican Cent. Ry. Co. v. Glover (Tex.), 107 F. 356, 46 C. C. A. 334.

"Jurisdictional amount is determined by what is first demanded, and what pleadings and proof shown as sustaining good faith and validity of demand."

Home Life Ins. Co. v. Sipp (C. C. A. N. J.), 11 F. (2d) 474.

The rule is further stated here:

"Where there is no cause to suspect that the action is colorable, or brought or prosecuted with the purpose and effect of perpetrating a fraud upon the jurisdiction of the court, and the amount in good faith claimed is within the jurisdiction, the trial court should not remand or dismiss the case *unless, from the nature of the action, it is apparent that the plaintiff cannot recover an amount within the jurisdiction.*" (Emphasis ours.)

Levinsky v. Middlesex Banking Co. (Tex.), 92 F. 449, 34 C. C. A. 452.

"If the plaintiff asserts, as his cause of action, a claim which he cannot be legally permitted to sustain by evidence, a mere ad damnum clause will not confer jurisdiction to the Federal Court, but the Court on motion or demurrer, or of its own motion, may dismiss the suit."

North American Transportation and Trading Co. v. Morrison, 178 U. S. 262, 44 L. Ed. 1061.

"A claim, to be within the jurisdiction of the court, must be based upon a reasonable expectation of recovering the required amount."

Nixon v. Town Taxi, 39 F. (2d) 618.

"As regards jurisdiction, the amount in controversy may be shown by pleadings and papers in the case other than the bill, or by evidence."

Leitch et al. v. City of Chicago, et al., 41 F. (2d) 728.

"A general allegation as to the subject matter being of value sufficient for jurisdiction is not conclusive when the bill carries its own contradiction on its face."

Cohn v. Cities Service Co., 45 F. (2d) 687.

"An allegation in the bill that the amount in controversy exceeds $3,000.00 is a mere conclusion of law, subject to be overridden by facts shown by the bill and exhibit."

Traveler's Ins. Co. of Hartford v. Rabinowitz, 9 Fed. Sup. 353.

IV. FEDERAL REVENUE LAWS NOT APPLICABLE.

Appellant next contends that inasmuch as the complaint alleges that the action is brought to recover a tax debt it shows upon its face that it is a case arising under a law providing for internal revenue and that therefore the Court has jurisdiction under Section 41 (5) U.S.C.A. Title 28.

The words "internal revenue" refer, of course, to federal taxes other than import duties. They do not include State taxes.

". . . Looking, then, to Sec. 629 of the revised Statutes, we find that by the fourth subdivision the circuit courts have been granted original ju-

risdiction 'of all suits at law or in equity arising under any Act providing for revenue from imports or tonnage,' and 'of all causes arising under any law providing internal revenue.' And again, by the twelfth subdivision, 'of all suits brought by any person to recover damages for any injury to his person or property on account of any act done by him under any law of the United States for the protection or collection of any of the revenues thereof.' This clearly implies that the term 'revenue law,' when used in connection with the jurisdiction of the Courts of the United States, means a law imposing duties on imports or tonnage, or a law providing in terms for revenue; that is to say, a law which is directly traceable to the power granted to Congress by Sec. 8, Art. I, of the Constitution, 'to lay and collect taxes, duties, imposts and excises.' "

U. S. v. Hill, 123 U. S. 681, 31 L. Ed. 275.

See also,

25 *C. J.* 727.

Appellant cites no authorities and none can be found which hold that State laws imposing taxes come within the provisions of the section above cited. If counsel's position is correct then Federal District Courts have jurisdiction of all actions, regardless of the amount involved, which are brought for the collection of State taxes.

B. ON THE MERITS.

I. THE INCOME SOUGHT TO BE TAXED WAS NOT REALIZED WHEN APPELLEE WAS A RESIDENT OF CALIFORNIA.

(a) THE LOWER COURT HELD, RIGHTLY, THAT THERE WAS NO TAX DUE THE STATE OF CALIFORNIA, BECAUSE THE INCOME WAS NOT REALIZED UNTIL AFTER APPELLEE BECAME A RESIDENT OF NEVADA.

"From the beginning the revenue laws have been interpreted as defining 'realization' of income as the taxable event rather than the acquisition of the right to receive it. And 'realization' is not deemed to occur until the income is paid."

Helvering v. Horst, 311 U. S. ....., 61 S. Ct. 149.

(Opinion of lower Court, Transcript of Record p. 93.)

"Under the Federal Income Tax Act the Federal Courts have established the principle that 'income' within the meaning of the Income Tax Act is 'realized gain' and that such realized gain is taxable in the year of its realization regardless of when it accrued."

Holmes v. McColgan, 110 Pac. (2d) 428, 430.

The tax is not due upon income until it is received.

People v. Rosen, 11 Cal. (2d) 147.

(b) TAX EXEMPTED BY CALIFORNIA STATUTE.

It may be contended by appellant that, conceding appellee was a non-resident when the income was realized, he was liable as a non-resident, for taxes on the source of which was in the State of California.

We cannot concede that the source of the income was in California because the winning ticket was purchased there.

In Ireland, where the transaction would be considered legal, it has been defined by the Courts as a contract, the situs of which is Ireland.

> "The ticket is a very useful protection to the purchaser of certain rights, which are defined by reference to the number on the ticket, which corresponds to that on the counterfoil. The ticket is not an offer. It, with the attached counterfoil, is more like a proposal form, and an offer is first made by forwarding the counterfoil with the price of the ticket, the ticket being retained by the purchaser. If the offer is accepted and the price of the ticket is retained and an official receipt is forwarded, the contract is thus concluded, and it is one made in Saorstat Eireann."
>
> *Apicella v. Scala,* Irish High Court, Transcript of Record, page 69.

There was no person or property in the State of California upon which the alleged jeopardy assessment of June 10, 1937, could be made.

The State can only levy an assessment upon persons or property within its jurisdiction.

The jeopardy assessment provision of the California act does not presume to operate against nonresidents.

California Personal Income Tax Act, Sec. 18.

The jeopardy assessment clause of the act provides for a form of process, which we believe, could not have extra-territorial effect.

Section 7, subdivision (f) of the California Act, provides:

> (c) SOURCE OF INCOME NOT IN CALIFORNIA.
>
> "Non-residents. In the case of taxpayers other than residents, the gross income includes only the gross income from sources within this State."
>
> . . .
>
> "Income of non-residents from stocks, bonds, notes, *or other intangible personal property* shall not be considered income from sources within this State unless the property has acquired a business situs in this State, except that if a non-resident buys or sells such property in this State or places orders with brokers in this State to buy or sell such property so regularly, systematically, and continuously as to constitute doing business in this State, the profit or gain derived from such activity is income from sources within this State irrespective of the situs of the property."
>
> *California Personal Income Tax Act,* Sec. 7 (f).

There is no allegation or claim that the income sued upon comes within the exceptions stated above.

We, therefore, respectfully submit that the judgment of the lower Court should be affirmed.

Dated, Reno, Nevada,
October 29, 1941.

Respectfully submitted,
A. P. JOHNSON,
Attorney for Appellee.